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FILED
SAN MATEO COUNTY

OCT 05 2010

Clerk of the Superior Court

By

DEPUTY CLERK

5 Attorneys for Appellant/Defendant,
6 BENJAMIN HAYNES

7
8 **SUPERIOR COURT, STATE OF CALIFORNIA**

9 **IN AND FOR THE COUNTY OF SAN MATEO**
10 **APPELATE DIVISION**

11 PEOPLE OF THE STATE OF CALIFORNIA,
12 Plaintiff and Respondent,

12 vs.

APPEAL NO. AD-5201

Case No.092072-C

APPELLANT'S OPENING BRIEF

13 BENJAMIN H [REDACTED],

14 Defendant and Appellant

Date: TBD

Time: TBD

Appellant Dept.: TBD

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19 **CASE SUMMARY:** On September 30, 2009, an alleged violation of CVC
20 § 21453(a), a photo enforced red-light camera violation occurred. The citation was
21 issued to the defendant who is the registered owner of the vehicle. This case came
22 on for trial in the Traffic Department in the above-mentioned court on June 1, 2010,
23 before Commissioner Susan Jakubowski. Menlo Park Police employee M.
24 Sandoval is the employee and/or officer who reviewed the information that was
25 forwarded to the Menlo Park Police Department by Redflex (the vendor in this
26

27
28 H [REDACTED] Opening Brief

1 case). It was M. Sandoval who decided, based upon that information that a violation
2 of CVC § 21453(a) had occurred. M. Sandoval signed the citation. However, at the
3 trial Menlo Park Police Officer, Sgt. Ron Prickett, appeared to testify as the
4 People's only witness. Sgt. Prickett offered into evidence a photo enforcement
5 packet that contained evidence identifying Benjamin H [REDACTED] as the driver of the
6 vehicle, along with other documents. Counsel objected to Sgt. Prickett's testimony
7 and to the introduction of the red light photo packet on foundation, hearsay and
8 Sixth Amendment grounds. The objections were overruled. Sgt. Prickett testified that
9 on September 30, 2009, an alleged violation of CVC Section 21453a had occurred,
10 what the vehicle plate was, who the vehicle was registered to, to the operation and
11 maintenance of the camera system, the date of mailing of the notice of the violation,
12 and to other matters contained in the documents and DVD that were part of the
13 Menlo Park Police Department court packet.
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16 On cross-examination Sgt. Prickett testified that he was not the person who
17 reviewed the Redflex information, or who signed and issued the citation. He
18 testified that M. Sandoval reviewed the Redflex information, determined that a
19 violation had occurred and then signed and issued the citation. Counsel again raised
20 Sixth Amendment objections, which were overruled. Sgt. Prickett testified that he
21 received 16 hours of training at the Redflex facility in April of 2010, which
22 included a tour of the facility, a review of the audit procedures, that he had an
23 additional 4 hours of training, and then 8 hours of training in San Rafael on
24 processing Redflex photo enforced violations. That training was in conducted with
25 employees from other counties, which had contracts with Redflex. Sgt. Prickett
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1 testified he had 4 additional 2-hour group meetings, and that he has been a police
2 officer for 29 years. Sgt. Prikett testified he has been trained in how to view
3 violations, how to screen them, and how to check for photo comparison and how to
4 process citations. On cross examination Sgt. Prikett testified that he does not know
5 who at Redflex is assigned to process violations from Menlo Park, he does not
6 know if the subject citation was processed in the normal course of business, at or
7 near the time of the alleged violation, he does not know who installed the system in
8 Menlo Park, he does not know who inspects and maintains the system.

9 The People rested.

10
11 The evidence packet, including the declaration of the Redflex custodian of
12 records, the photographs, and the DVD of the incident, were admitted into evidence
13 over counsel's Sixth Amendment and hearsay objections pursuant to E.C. §
14 1271(c). The court found Sgt. Prikett to be "an otherwise qualified witness"

15
16 **MOTIONS:**

17 Defendant, through counsel moved for a dismissal pursuant to CVC § 210,
18 in that the system had failed to capture "...a clear photograph of a **vehicle's** license
19 plate and the driver of the vehicle". (Attachment A)The Court denied that motion.

20 Counsel, objected to the introduction of the evidence packet and the DVD
21 from Redflex on foundation and hearsay grounds. Counsel further objected to the
22 introduction of the Redflex Packet because no one from Redflex was present in
23 court, nor was the citing officer present to testify, and therefore, the information
24 contained in the packed violates the findings of the Supreme Court ruling in
25 Crawford v. Washington, (2004) 541 U.S. 36 , 124 S.Ct. 1354, and more recently in
26

1 Melendez-Diaz v. Massachusetts (2009) 129 S.Ct. 2527. The defendant had a right
2 to confront all the witnesses against him including the Redflex employees who had
3 assembled and forwarded the information to the Menlo Park Police Department, as
4 well as the citing officer. Counsel asked for a dismissal of the charges in that the
5 contract between Redflex and Menlo Park is not cost neutral as is required by CVC
6 § 21455.5(g) in that "customer, Menlo Park, will not pay more to Redflex than
7 actual cash received" page 25 of the contract. Commissioner Jakubowski overruled
8 all of defense objections, denied the P. C. § 1118 motion, admitted the packet, along
9 with the DVD and all documents into evidence.

11 **VERDICT AND SENTENCE:**

12 The Court later made a finding of guilt and ordered the defendant to pay a fine of
13 \$570 by July 19, 2010.

15 **QUESTIONS PRESENTED:**

16 **1. SHOULD THE COURT HAVE GRANTED DEFENDANT'S MOTION TO
17 DISMISS PURSUANT TO C.V.C. § 210**

18 Vehicle Code § 210 states:

19 **210.** An "automated enforcement system" is any system operated by
20 a governmental agency, in cooperation with a law enforcement
21 agency, that photographically records a driver's responses to a rail or
22 rail transit signal or crossing gate, or both, or to an official traffic
23 control signal described in Section 21450, and is designed to obtain
24 a clear photograph of a **vehicle's** license plate and the driver of the
25 **vehicle.**

26 In the instant case the photograph of the driver's face is not "clear". The face is
27 obscured by the visor, the rear view mirror and by the sunglasses that the driver is
28 wearing. Accordingly, the defense motion to dismiss should have been granted.

1 The person with direct knowledge of the workings of the camera-computer system
2 did not testify. Instead, the prosecution chose to submit the testimony of a local
3 police officer, Santa Ana Police Officer Alan Berg. This witness testified that
4 sometime in the distant past, he attended a training session where he was instructed
5 on the overall working of the system at the time of the training.”

6 The court found that neither the Business Records Exception nor the Official
7 Records Exception of the Evidence Code is applicable exceptions to the Hearsay
8 Rule in cases such as these. The Official Records Exception (Evid. Code 1280)
9 does not apply in this situation because the writing was not made by a “public”
10 employee who was under a legal duty to make such a report. This is the same
11 situation as in our case where Redflex, Inc., the company who prepared the
12 photographs and documents is not a public entity; it is a privately held corporation.

13 The Court found that the Business Records Exception (Evid. Code 1271)
14 does not apply in the situations such as these. The court stated that, “in order to
15 establish the proper foundation for the admission of a business record, an
16 appropriate witness must be called to lay that foundation. ...Generally, the witness
17 who attempts to lay the foundation is a custodian, but any witness with the requisite
18 firsthand knowledge of the business’s record-keeping procedures may qualify. The
19 proponent of the admission of the documents has the burden of establishing the
20 requirements for admission and the trustworthiness of the information. (People v.
21 Beeler, 9 Cal.4th at p. 978) And the document cannot be prepared in contemplation
22 of litigation. (Palmer v. Hoffman (9143) 318 U.S. 109.) The Appellate court found
23 that the officer in the case could not lay a foundation for the introduction of the
24 photographs and the underlying workings of the Reflex System because this
25 information was outside the personal knowledge of the officer. See also, People v.

1 Beckley, 2010 WL 2293410 (Cal. App. 2 Dist.) for laying a foundation for digital
2 photographic evidence.

3
4 The facts in the subject case are the same as the facts in *Khaled*, supra. In
5 the instant case, the complaining witness, Officer Pricket, offered into evidence a
6 court packet of photographs, certain maintenance and other camera records were
7 offered, all purportedly to establish that the defendant allegedly failed to stop for a
8 steady circular red light. However, the People did not call to testify any
9 representative from Redflex, the company that provides the camera equipment and
10 technology, to lay a foundation for the admissibility of the four photographs, the
11 DVD or the other documents. A custodian of records or other qualified company
12 representative would be able to testify to the technology, where the equipment is
13 placed, the procedures for operating the system, the procedures for maintaining the
14 system and where records of the company are stored. Only a company employee,
15 i.e. custodian of records, could testify as to where Redflex set up their equipment,
16 how they operate and maintain it, and the procedures followed to cause a Notice to
17 Appear to issue. Only a Redflex employee can testify to as to whether or not the
18 subject packet and DVD were created in the “normal course of business.” Only a
19 Redflex employee could offer testimony that he or she is familiar with the operation
20 of the cameras, computers and maintenance, including troubleshooting problems. A
21 Redflex employee could address how the image was transmitted to a location in
22 Phoenix or some other facility in California for processing, and then retransmitted
23 to the Menlo Park Police department for the preparation of the “court package”.
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1 Only a Redflex employee could testify as to how the image was downloaded into a
2 computer, and how that image may have been subjected to manipulation within the
3 computer to add information, or enhance or enlarge the image, and to add
4 information to the top center, and information as to the elapsed time of the yellow
5 and red lights.

6 Officer Prickett could not even testify that he was at the Menlo Park Police
7 Station when the information was transmitted and downloaded. Officer Prickett
8 could only testify that he was provided with a file for court. Had the officer of
9 Menlo Park Police Department employee M. Sandoval appeared at the trial he may
10 have provided different testimony. However, M. Sandoval did not appear. Rather,
11 Officer Prickett appeared in court to testify about a citation signed by M. Sandoval.

12
13 **3. WHETHER THE COURT WAS IN ERROR TO DENY DEFENDANT'S**
14 **HEARSAY OBJECTIONS BASED ON MELENDEZ-DIAZ V.**
15 **MASSACHUSETTS?**

16 The Supreme Court, in a recent ruling, Melendez-Diaz v. Massachusetts
17 (2009) 129 Sect. 2527, expands its findings in Crawford, supra, regarding
18 defendants' right under the Sixth Amendment. The Diaz case involved the
19 admissibility of certificates of analysis for blood samples, sworn to by technicians
20 (analysts) at state laboratories, without requiring in court testimony from the analyst
21 who prepared the documents. The question presented to the court was whether the
22 affidavits are 'testimonial,' rendering the affiants 'witnesses' subject to the
23 defendant's right of confrontation under the Sixth Amendment.

24 The court, using a Crawford analysis, found that the documents were
25 "testimonial" evidence and as such were inadmissible absent the opportunity to
26 cross-examine the witness (i.e. the technician who completed the analysis).

1 “Business and public records are generally admissible absent confrontation,
2 not because they qualify under an exception to the hearsay rules but, because
3 having been created for the administration of an entity’s affairs, and not for the
4 purpose of establishing or proving some fact at trial, they are not testimonial.
5 Whether or not they qualify as business or official records, the analysts’ statements
6 here were prepared specifically for use at petitioner’s trial and, therefore, were
7 testimony against petitioner. Consequently, the analysts were subject to
8 confrontation under the Sixth Amendment” *Id.*, at 2540, 129 S.Ct. 2527.

9
10 In summary the Supreme Court held:

- 11 1. analysts’ certificates of analysis were affidavits within core class of
12 testimonial statements covered by Confrontation Clause
- 13 2. analysts were not removed from coverage of Confrontation Clause on theory
14 that they were not “accusatory” witnesses;
- 15 3. analysts were not removed from coverage of Confrontation Clause on theory
16 that they were not conventional witnesses
- 17 4. analysts were not removed from coverage of Confrontation Clause on theory
18 that their testimony consisted of neutral, scientific testing
- 19 5. certificates of analysis were not removed from coverage of Confrontation
20 Clause on theory that they were akin to official and business records and
- 21 6. *defendant’s ability to subpoena analysts did not obviate state’s obligation to
22 produce analysts for cross-examination.*

23 In the case at hand, Redflex has created, and maintains, a system of cameras
24 and computers that produce photographs and documents that are then used to
25 prosecute defendants for being traffic violators. None of the Redflex camera
26 technicians appeared at the trial, though it is their work product that is the only
27 evidence the People relies upon in its prosecution of the defendant. Without the
28 right to cross-examine these witnesses there is no way to determine whether the
pictures were enhanced, whether the system functioning properly, who at Redflex
may have developed the photos, who at Redflex maintained the system and who at

1 Redflex determined that the subject photos constituted a violation of C.V.C. §
2 21453a.

3 In addition, the officer who issued the citation to the defendant did not
4 appear at the trial to testify for the prosecution. Without explanation, Officer
5 Prickett appeared to testify at the trial. Officer did not make the determination to
6 issue this citation. He was not at the Menlo Park Police department when the
7 information arrived. Rather it was M. Sandoval who signed and issued the citation.
8 M. Sandoval was not present in court. A defendant has a right to cross-examine all
9 witnesses against him in a criminal matter. In this case, the defendant's Sixth
10 Amendments rights were violated because he was given no opportunity to cross-
11 examine the citing officer.

12 CONCLUSION:

13 Defendant's motion to dismiss pursuant to Vehicle Code Section 210
14 should have been granted in the absence of a clear photograph of the driver. No
15 conviction of CVC §21453(a) unless the record contains substantial evidence
16 supporting each element of the charged offense. Absent the Custodian of Records of
17 Redflex, the entire photo packet and DVD were inadmissible hearsay. Defendant
18 has a right to confront all the witnesses against him. The failure of the People to
19 have any Redflex employee present violates defendant's Sixth Amendment rights.
20 The failure of the People to have the citing officer testify in this case also violates
21 the defendant's Sixth Amendment rights.
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24 DATED: October 4, 2010

Respectfully submitted,
~~SHERRY GENDELMAN~~
SHERRY GENDELMAN
Attorney for Appellant.